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No. 93-1850

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1994

CHOPP COMPUTER CORPORATION, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a district court order authorizing the United States to levy against an account at PaineWebber Incorporated gives rise to a Federal Tort Claims Act action against the United States because of a prior state court preliminary injunction ordering the owners of that account not to transfer the funds.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A10931-A10955) is reported at 5 F.3d 1344. The opinion and judgment of the district court (Pet. App. D1-D8, E1-E3) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 29, 1993, and a petition for rehearing was denied on February 16, 1994. Pet. App. C1-C2. The petition for a writ of certiorari was filed on May 17, 1994. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case is a Federal Tort Claims Act (FTCA) action for damages based on an execution of levy by the United States on a brokerage account at PaineWebber Incorporated in which petitioner claims to have had an interest.

In 1986, petitioner filed suit against investment promoter Alex Laurins and others in the Superior Court for the City and County of San Francisco, alleging that Laurins and the other defendants in that case had engaged in a scheme to manipulate petitioner's stock in order to profit from short sales of the stock. Pet. App. A10934. The state court issued a preliminary injunction, enjoining the defendants from "[w]ithdrawing or transferring, directly or indirectly, any proceeds of any 'short' sale of [petitioner's] stock." *Ibid.* Laurins held some such funds in the PaineWebber account, but PaineWebber was not named in the state court action or in the injunction, which was addressed to short-sale proceeds generally, rather than to any specific account. *Ibid.*

While petitioner was proceeding with the merits of its suit against Laurins and the other defendants in state court, the United States began an investigation of the Gold Depository & Trust Company (GDTC), an alter ego company of Laurins. Pet. App. A10934-A10935. In a civil tax proceeding against GDTC, a federal district court imposed a $444,000 penalty against GDTC for its failure to comply with a discovery order. *Id.* at A10935. The United States subsequently reduced this penalty to judgment. *Ibid.* In a later criminal proceeding, a federal district court fined Laurins $250,000 and sentenced him to prison for obstruction of justice and criminal contempt. *Ibid.*

The United States subsequently obtained writs of execution for the civil judgment and criminal fine (which cumulatively totalled $694,000) which it served on PaineWebber.

Pet. App. A10935. After serving the writs, the United States was apprised by petitioner on February 17, 1990 of the state court's order enjoining Laurins and the other defendants in that suit from transferring the proceeds of any short sales of petitioner's stock. *Ibid.* PaineWebber subsequently informed the United States that it would require a district court order to release the funds to the United States. *Ibid.* The United States obtained such an order from a federal district court and PaineWebber complied with it. *Ibid.* When applying for the federal court order, the United States did not inform the district court of the state court injunction. *Ibid.*

In March, 1990, petitioner filed a $694,000 administrative claim against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b). Pet. App. A10935. The claim was denied by the Attorney General in August, 1990. *Ibid.*

In October, 1990, petitioner obtained a $29 million judgment against Laurins and the other defendants in the state court action. Pet. App. A10935. The judgment provided, *inter alia,* that a constructive trust be imposed on all profits from transactions in petitioner's stock by Laurins and that PaineWebber distribute the contents of the brokerage account to petitioner. *Id.* at A10936.

After obtaining the judgment, petitioner filed the instant action, alleging that the United States and PaineWebber were liable under the FTCA and California law for conversion and for violation of the state court's preliminary injunction. Pet. App. A10936. Petitioner claimed that the state court injunction gave it an interest in the PaineWebber account at the time of the United States' levy, which allegedly made the United States' levy on that account an unlawful conversion of petitioner's property for which both the United States and PaineWebber were liable. *Ibid.* Petitioner also claimed that the United States,

upon levying on the account, became a successor in interest to Laurins and thus was bound by the preliminary injunction not to transfer the funds from the PaineWebber account. *Id.* at A10946. PaineWebber, petitioner alleged, was bound as Laurins' agent not to release the funds to the United States. *Ibid.*

The United States moved for summary judgment, which the district court granted, holding that no conversion had occurred, since petitioner had "never actually possessed" the money in the account, and "no court had ruled that [petitioner] was entitled to any of th[e] money," before the United States executed its levy on the account. Pet. App. D6. The district court further held that the United States had not violated the preliminary injunction, since it was not named in the injunction, and "was not a successor in interest" to anyone named in the injunction. *Id.* at D5. The court also suggested that the exclusive remedy for violation of a preliminary injunction should be a civil contempt proceeding and not one for damages. *Id.* at D5-D6.[1]

The Ninth Circuit affirmed the decision of the district court, finding that petitioner had no cognizable claim of conversion, since petitioner had neither a "right to possession" nor "title" to the funds in the PaineWebber account at the time of the United States' levy. Pet. App. A10943. The court acknowledged that damages were available for the violation of a preliminary injunction but held that petitioner was not entitled to any such remedy, because neither the United States nor PaineWebber was named in the state court injunction or was otherwise bound by it. *Id.* at A10946. The court held that the United States did not become "a successor in interest" to Laurins by levying against his account, and that PaineWebber, although an

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[1] The district court's final judgment (Pet. App. E1-E3) dismissed petitioner's claims against PaineWebber as well.

agent of Laurins, had acted "on its own authority" and outside its role as Laurins' agent when it released the funds in the account to the United States. *Ibid.*

Judge Reinhardt dissented. Pet. App. A10947-A10955.

ARGUMENT

Petitioner does not present the same arguments here that it made below. Specifically, it does not challenge the Ninth Circuit's decision that no conversion occurred under California law. Pet. 10. Petitioner now contends instead that in reaching its decision the Ninth Circuit "overrul[ed]" the "equitable orders" of the state court in violation of principles of federalism, *ibid.*, and that the government's failure to inform the federal district court of the existence of the state court's preliminary injunction warrants review under this Court's supervisory power. Pet. 16-17.

1. Petitioner concedes at the outset the correctness of the Ninth Circuit's holding that the United States was not liable for conversion under California law. Pet. 10. As the court of appeals explained, at the time the United States levied against the funds in the PaineWebber account, the petitioner did not have title or a right to possession over the funds in the account. Pet. App. A10943. Nor did the fact that the state court imposed a constructive trust over Laurins' gains at the conclusion of the state court proceedings retroactively create equitable title in petitioner over the funds. A constructive trust "is only a remedy" under California law, *Stansfield* v. *Starkey*, 269 Cal. Rptr. 337, 347 (Ct. App. 1990), and cannot impede a prior claim of a third party that has been converted to judgment and levied upon. Pet. App. A10940. There was consequently no conversion under California law that might have formed the basis for a claim under the FTCA.

2. Petitioner's new argument that the Ninth Circuit "overruled" the state court appears to be premised on the notion that the state court was the first to obtain jurisdiction over the PaineWebber account, thus allegedly precluding a federal court from later issuing orders affecting that account. Pet. 10-11, 15.[2] In petitioner's view, the United States wrongfully induced a federal district court into ordering PaineWebber to release the funds in the brokerage account, which interfered with the state court's alleged jurisdiction over the account. Pet. 4-7, 15. Petitioner argues that, in denying petitioner's FTCA claim for damages, the Ninth Circuit failed to recognize the primacy of the state court's jurisdiction over the account. Pet. 11.

As a threshold matter, petitioner's challenge to the district court's order should have been made through an appeal of that order and not collaterally through this FTCA claim for damages. Upon learning of the order, petitioner could have intervened in the district court proceeding, pursuant to Rule 24 of the Federal Rules of Civil Procedure, and challenged the district court's authority to issue an order concerning the PaineWebber account in light of the state court's preliminary injunction. No decision by the Court in this case would affect the district court's order to which petitioner objects.

In all events, the district court's order was entirely appropriate and thus cannot give rise to FTCA liability. As this Court observed in *Penn General Casualty Co.* v. *Pennsylvania ex rel. Schnader,* 294 U.S. 189, 195 (1935),

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[2] Cf. *Donovan* v. *City of Dallas,* 377 U.S. 408, 412 (1964) (a "state or federal court having custody of * * * property has exclusive jurisdiction to proceed"); *Covell* v. *Heyman,* 111 U.S. 176, 182 (1884) (once a state or federal court "takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty").

"[w]here the judgment sought is strictly *in personam,* for the recovery of money or for an injunction compelling or restraining action by the defendant, both a state court and a federal court having concurrent jurisdiction may proceed with the litigation." In this case, petitioner sought "money" and an "injunction * * * restraining action by the defendant" in the state court proceeding. *Ibid.*; see Pet. App. A10944. The pendency of that *in personam* action against Laurins and the issuance of a preliminary injunction directed solely against the defendants in that action did not preclude the federal court from proceeding to enforce a judgment that the government had already obtained against Laurins.[3]

The cases relied upon by petitioner (Pet. 12-15) do not suggest a different result, for they involve very different facts. In each of the cases cited, one court had already exercised *in rem* or *quasi in rem* jurisdiction over particular assets when a second court sought to control the disposition of the same assets.[4] In the present case, by

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[3] This Court has previously described the circumstances under which one court has exclusive jurisdiction to proceed:

> [T]he principle applicable to both federal and state courts that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, [applies] where property has been actually seized under judicial process before a second suit is instituted, [and] applies as well where suits are brought to marshal assets, administer trusts, or liquidate estates, and in suits of a similar nature where, to give effect to its jurisdiction, the court must control the property.

Princess Lida v. *Thompson,* 305 U.S. 456, 466 (1939). Petitioner's suit for damages in state court did not involve any of the above circumstances.

[4] See *United States* v. *Bank of New York & Trust Co.,* 296 U.S. 463, 478 (1936) (suit in federal court by United States to obtain failed insurance companies' assets that had been placed, at the direction of a state court, in the possession of local trust companies and the State

contrast, petitioner did not bring an *in rem* or *quasi in rem* proceeding specifically concerning ownership of the PaineWebber account, nor did the issuance of a preliminary injunction against the defendants in that action constitute *in rem* or *quasi in rem* relief. Petitioner's state court action was a suit for damages that, unlike the cases cited by petitioner, did not require that the state court "have possession or control of the *res* in order to proceed with the cause and to grant the relief sought." *United States* v. *Bank of New York & Trust Co.*, 296 U.S. at 477.[5]

3. Petitioner also contends this Court should exercise its "supervisory power" to review the decision below because the United States committed an "illegal" and "amoral" act by obtaining federal court orders for the release of the funds in the PaineWebber account without

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Superintendent of Insurance); *Penn General Casualty Co.* v. *Pennsylvania ex rel. Schnader*, 294 U.S. 189, 195 (1935) (state court and federal court both sought to control the liquidation of an insolvent corporation); *Lion Bonding & Surety Co.* v. *Karatz*, 262 U.S. 77, 90 (1923) (federal court appointed receivers to take possession of assets already in the possession of the State Department of Trade at the order of a state court); *Palmer* v. *Texas*, 212 U.S. 118, 125 (1909) (when state court had already appointed receiver to control certain assets, federal court could not exercise control over those assets except as permitted by the state court); *Covell* v. *Heyman*, 111 U.S. 176, 182 (1884) (state court authorized recovery of property seized by U.S. Marshal pursuant to federal court order); see also *United States* v. *Van Cauwenberghe*, 934 F.2d 1048, 1062-1063 (9th Cir. 1991) (writ of attachment by one court of assets held in possession of another is permissible with permission of court in possession of assets).

[5] Even if the state court had actually asserted jurisdiction over the PaineWebber account in an *in rem* or *quasi in rem* proceeding, that still would not have given plaintiff a basis for the FTCA claim it asserts here, since the state court's assertion of jurisdiction would not have given petitioner title or a right to possession over the funds in the account under California law. The government's subsequent levy against the account thus could not have constituted conversion.

informing the federal court of the existence of the state court preliminary injunction. Pet. 16-17.

Unlike the present case, the principal case cited by petitioner, *Harkin* v. *Brundage*, 276 U.S. 36, 54 (1928), involved a failure by a party in federal court to inform the court of a pending state court proceeding that had the same purpose as the federal court proceeding—the appointment of a receiver to control the assets of a failed corporation.[6] No similar direct conflict between the state and federal proceedings was present here. Nor did the action of the United States in seeking to levy on the funds in the PaineWebber account constitute a violation of the state court injunction, since neither the United States nor PaineWebber was a party to that injunction. As petitioner recognizes, any impropriety in failing to inform the district court of the state court injunction would not, in all events, create a basis for asserting liability under the FTCA, which is the only subject of the present action.

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[6] The same party also defrauded the state court by making false representations designed to conceal its intention to obtain the appointment of a receiver in federal court. 276 U.S. at 48-49.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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